SCOTT & ENGLISH (MALAYSIA) SDN. BHD. v. FOO THOR LOMBONG BIJIH SDN. & ANOR.

[O.C.J. (Abdul Razak J.) March 20, 1984]

[Kuala Lumpur – Civil Suit No. C921 of 1982]

Contract – Claim for cost of repairs – Contracts Act, 1950, s.42 – Scope of.

In this case the plaintiff was a repairer of machines. The first defendant was the owner of a Cummins gravel pumpset. The second defendant was an insurance agent for N.E.M. Insurance Bhd. with whom the first defendant insured the machine.

The first defendant and the second defendant took the machine to the plaintiff to do certain repairs. They agreed to pay the plaintiff the sum of $37,115.77 based on the quotation to be submitted and approved by the insurance company. The quotations were duly submitted by the plaintiff and the insurance company gave approval for the repairs to be effected by the plaintiff to the value stated less $2,500.00 deductible under the excess clause. The insurance company refused to meet the claim stating that they never authorised the second defendant to do the repairs or gave approval in that respect.

The plaintiff's claim against the first and the second defendants for the cost of repairs was dismissed by the Sr. Asst. Registrar. The appeal against the said decision was proceeded only against the first defendant.

Held, allowing the appeal: section 42 of the Contracts Act 1950 applies only when a contract has in fact been performed by a third person. In this case the contract was, however, never performed by the second defendant since the cheques they gave in payment of the debt were all dishonoured.

Cases referred to:

(1) *Haji Nik Ishak* v. *Nik Zainab* [1975] 2 M.L.J. 82.
(2) *Har Chandi Lal & Ors.* v. *Sheoraj Singh* 39 I.C. 343.

CIVIL SUIT.

Miss C.C. Lim for the appellant.
Ong Chin Beng for the respondent.

Cur. Adv. Vult.

Abdul Razak J.: The question before me was simply, what was the proper construction to be given to Section 42 of the Contracts Act where the promisee accepts the performance of the promise from a third party. Can the promisee still enforce the agreement against the promissor? The first defendant, who was the promisor with the second defendant, says under the circumstances it was not liable to the plaintiff the promisee, but the third party. The plaintiff, a limited company, was a repairer of machines. The first defendant was the owner, namely of a Cummins gravel pumpset. The second defendant was an insurance agent for N.E.M. Insurance Berhad with whom the first defendant insured the machine. At some stage or another, the first defendant and the second defendant took the machine to the plaintiff to do certain repairs. They agreed to pay the plaintiff the sum of $37,115.77 based on the quotation to be submitted to and approved by the insurance company. The quotations were duly submitted by the plaintiff and the insurance company it seems issued instructions and gave approval for the repairs to be effected by the plaintiff to the value stated less $2,500.00 deductible under the excess clause. The repairs were duly carried out, but the insurance company refused to meet the claim stating that they never authorised the second defendant to do the repairs or gave approval in that respect. The plaintiff's action against the first and second defendants was for the cost of the repairs. They took out a summons for summary judgment before the Senior Assistant Registrar but this was dismissed. Hence this appeal before me.

At the outset, counsel for the appellant/plaintiff stated that she was not proceeding against the second defendant. The appeal was allowed. The matter has now come back before me for further argument in open court.

The first defendant contended that since the second defendant had performed the promise made between them, they should not be held liable.

This is based on section 42 of the Contracts Act which provides:

> "When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

In support of the contention, he cited the case of *Haji Nik Ishak* v. *Nik Zainab*(1) as authority for that proposition. There the appellant had transferred his land to the respondent and the respondent had transferred his land to the appellant for $25,000.00 and $14,000.00 respectively. There was a balance of $11,000.00 due from the respondent to the appellant. The respondent's son agreed to pay the amount, but did not do so.

The appellant then sued the respondent for the sum, but the Federal Court held as the appellant had agreed to accept the offer to settle the amount by the respondent's son, he was precluded from enforcing it against the respondent. But Ali F.J.'s judgment can be distinguished. There, there was a specific representation made by the third party. The defendant's son told the plaintiff that he would discharge the defendant's obligation which offer the plaintiff agreed to accept. This was so clearly stated by the plaintiff himself in the statement of claim. In our case, however, there was no such *agreement* to accept the second defendant's performance in place of the first defendant. I think there was no doubt also that as the section itself provides, there must be *performance* before the section can apply. Once performed, the promisee cannot go again against the promisor, but clearly this was not the case before me because the contract was never performed by the second defendant since the cheques they gave in payment of the debt were all dishonoured. The authorities are clearly in support. In the *Har Chandi Lal & Ors.* v. *Sheoraj Singh* [2] , the Privy Council said: "It need hardly be added that this section applies only when a contract has in fact been performed by a third person." *Pollock & Mulla* (9th Edition page 361) is also to the same effect.

In the circumstances, I would confirm the Order earlier made allowing summary judgment to be entered against the first defendant and costs. It seems to me the first defendant may not be entirely without remedy because they may bring an action against the insurance company, and the latter in turn is entitled under its agreement with the second defendant their agent to be indemnified for any default committed by the agent's officers.

Order accordingly.

Solicitors: *Skrine & Co.; Ong Chin Beng & Associates.*

LEONG YEW CHIN t/a WEST MALAYSIA FROZEN FOOD CO. v. HOCK HUA BANK BHD.

[O.C.J. (Abdul Razak J.) April 20, 1984]

[Kuala Lumpur – Civil Suit No. C1073 of 1980]

Banking – Bills of exchange – Bills dishonoured by drawee – Bank's refusal to pay drawer/client – Whether bank was holder in due course or collector.

The plaintiff was the defendant bank's client. Bills of exchange drawn by the plaintiff were presented to and received by the bank. Later, the bank found them to be dishonoured by the drawee. The bank had earlier credited sums for the amount shown in the Bills to the plaintiff's account. Subsequently the account was debited against the plaintiff, when it was found that the Bills had not been met. The plaintiff claimed for the sum of $1,230,207.55 against the bank. The plaintiff claimed that the said sum had been unlawfully and illegally debited against them. It contended that as holder in due course, the defendant was bound to honour the Bills, particularly since they had not challenged or protested against their validity. The Sr. Asst. Registrar dismissed the plaintiff's claim. The plaintiff appealed.

Held, dismissing the plaintiff's appeal: in the letter of instructions on outward documentary Bills, it was clearly provided that the plaintiff was to refund the advance in case of non-acceptance or non-payment of Bill. These terms quite unequivocally refer to the position of the defendant bank as the collector, and therefore it would not be liable on the Bills unless they were met.

CIVIL SUIT.

Chew Biman for the plaintiff/appellant.
Peter K.C. Yeo for the defendants.

Cur. Adv. Vult.

Abdul Razak J.: This is an appeal by the plaintiff against the Senior Assistant Registrar's order dismissing their application for summary judgment. The plaintiff was the defendants' client. The defendants were a bank. Bills of exchange drawn by the plaintiff were presented to and received by the defendants. Later, the defendants, found them to be dishonoured by the drawee. The defendants had earlier credited sums to the plaintiff's account for the amount shown in the Bills. Subsequently, however, the account was debited against the plaintiff, when it was found that the Bills had not been met. The plaintiff's claim against the defendants is for the sum of $1,230,207.55, which had been unlawfully and illegally debited against them. It contended that as holders in due course, the defendants were bound to honour the